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No. 07-654

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In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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I. CERTIORARI IS NECESSARY TO DETERMINE WHETHER JENNINGS ARTICULATED A CONSTITUTIONALLY PROTECTED RIGHT.

In addressing a claim under 42 U.S.C. 1983, a Court must first "determine whether the plaintiff has alleged the deprivation of an actual constitutional right." *Abreu-Guzman v. Ford,* 241 F.3d 69, 73 (1st Cir. 2001) (citations omitted). Second, the court must "proceed to determine whether the right was clearly established at the time of the alleged violation." *Id.* (citations omitted). If the answer to either of these questions is "no," then the plaintiff's claim must be dismissed. In this case, Jennings has failed to articulate a constitutionally protected right with any degree of specificity. At most times he has alleged a very general right under the Fourth Amendment to be free from excessive force. That is not enough to state a claim for excessive force, or to defeat a claim for qualified immunity. If the late-developing theory that Jones increased the pressure on Jennings' leg in the twelve seconds under review is accepted, the outcome is no different. No court has ever held that a suspect who is refusing the lawful commands of police officers has the right to be free from increased pressure on a limb before he is under control and handcuffed. As in *Wilson v. Layne,* 526 U.S. 603 (1999), "the constitutional question presented in this case is by no means open and shut." The constitutional weight of authority is on Jones' side, and the First Circuit has muddied the waters with its unwieldy decision.

II. THIS COURT SHOULD GRANT CERTIORARI TO DEFINE AND CLARIFY THE SIGNIFICANCE OF WHEN A SUSPECT IS "UNDER CONTROL" FOR DETERMINING WHETHER FORCE USED DURING AN ARREST IS EXCESSIVE.

Although an Eighth Amendment case, *Hope v. Pelzer*, 536 U.S. 730 (2002) concluded that qualified immunity was not available to officer based in part upon the fact that the inmate was completely subdued and handcuffed before being hitched to a post in the hot Alabama sun for seven hours. In finding that no case law was needed and the constitutional violation was obvious, this Court wrote that "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison." 536 U.S. at 738. This Court declined to cloak the prison guard with qualified immunity based on the "clear lack of an emergency situation." Even this Court in *Hope* intimated that the hitching would have been permissible during the period "required to address an immediate danger or threat." 536 U.S. at 747. Contrast the situation here, where Jennings was not handcuffed or under control, was still resisting arrest, and when it was far from clear whether he was armed, at the time of the injury. The First Circuit's decision cannot be reconciled with *Hope,* and should not be allowed to confuse law enforcement officers in the performance of their duties.

III. THE FIRST CIRCUIT'S DETERMINATION THAT JONES' CONDUCT WAS SO OBVIOUS THAT NO PRIOR CASELAW WAS NEEDED EFFECTIVELY EVISCERATES THE QUALIFIED IMMUNITY DOCTRINE.

Notwithstanding that the uncontradicted testimony was that Jones' actions were reasonable given the totality of the circumstances, the First Circuit found that his conduct was so obviously a violation of the Fourth Amendment that he did not need prior caselaw to put him on notice. *Hope v. Pelzer, supra,* advanced the notion that in certain exceptional circumstances, no prior case law directly on point is necessary to establish a constitutional violation. This case does not fit into the parameters of that decision. In *Hope* this Court found that the tethering of a shirtless prisoner to a "hitching post" so that his arms were raised and immobile, without affording him water or bathroom breaks – contrary to practice and policy – violated the constitution, and that the prison guards who administered this punishment did not need prior caselaw to know that. *Hope* is thus reserved for cases where "obvious cruelty" is inherent in the behavior under scrutiny. In this case, it simply cannot be said that the use of a control technique taught and used by police officers in Rhode Island and throughout the country is "antithetical to human dignity." 536 at 745.

Although Jennings excerpts a few sentences from Lt. Delaney's testimony, he still cannot provide any testimony that: 1) a reasonable officer in Jones' situation would have done anything differently; 2) that a reasonable officer in Jones' situation would have decreased pressure on Jennings' leg or; 3) that a reasonable officer in Jones' situation would not have increased the pressure on Jennings' leg. To support his conclusion, Jennings asks that the Court extrapolate all of that from a few bits of testimony that are taken completely out of context and, rather, should be read in its entirety. Once again, it is important to note that Lt. Delaney testified that Jones' actions were reasonable and consistent with how the technique is taught in the Rhode Island State Police Academy, and that the increase and decrease in the levels of force referred to the levels in the Use of Force Continuum.

IV. CERTIORARI IS NECESSARY TO DETERMINE WHETHER A SINGLE DECISION FROM ONE CIRCUIT "CLEARLY ESTABLISHES" THE LAW IN ANOTHER FOR PURPOSES OF QUALIFIED IMMUNITY.

There is presently a split in the circuits, recently widened by the First Circuit's decision in this case, as to how the law may be "clearly established" for qualified immunity purposes.[1] Although this Court spoke

[1] For a detailed discussion of the circuit split, see the amicus curiae brief filed by the states of Colorado, Alaska,

(Continued on following page)

clearly in *Wilson v. Layne, supra*, several Circuits are straying from its teachings. In *Wilson*, this Court found that the actions under review had violated the Constitution, but that no case with the requisite degree of specificity had put the defendants on notice. *Wilson* built upon the framework established by this Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Those decisions teach that "'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson,* 526 U.S. at 615, quoting *Anderson,* 483 U.S. at 640. The right must be defined at the appropriate level of specificity before a court can determine whether it was clearly established. As stated above, Jennings failed at the threshold to articulate exactly what right was infringed.

Arkansas, Florida, Hawaii, Idaho, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Pennsylvania, South Dakota, Virginia and Wisconsin in support of granting certiorari.

Wilson provided qualified immunity to law enforcement officers in part because the suspects did not cite "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. at 617. The suspects in *Wilson* relied upon a case decided on summary judgment from another circuit in their quest to have the federal courts declare the right "clearly established," much like the present case. In rejecting that argument, this Court found that the law was in an undeveloped state, and that the officers could not have been "expected to predict the future course of constitutional law." *Id.* (citations omitted). As in this case, where the score is two judges finding the law to be clearly established, and two who do not, the following applies with equal force: "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. Governmental officials should not be expected to be "seers in the crystal ball of constitutional doctrine." *Westberry v. Fisher,* 309 F.Supp. 12, 17 (D.Me. 1970).

Even if this Court accepts Jennings' increased torque argument, qualified immunity should still protect Jones, since there are no decisions that put him on notice that such conduct exceeded constitutional boundaries. Jones is not arguing that there be a case identical to the situation facing him, but all of the

cases involving use of control techniques ultimately determine that the officers' discretion should be given deference, and hold that no constitutional violation has occurred. Neither Jennings nor the First Circuit could point to any case in any circuit establishing that the unlawfulness of Jones' conduct was apparent.

In arguing that the First Circuit was correct, Jennings makes the remarkable statement that "Jennings was docile for a substantial period of time." This is refuted by the record and indeed the First Circuit notes that at most, it was twelve seconds after Hill stood up that the injury occurred. To allow this reasoning to stand would render the defense of qualified immunity meaningless.

A comparison of *Smith v. Mattox,* 127 F.3d 1416 (11th Cir. 1997) and the present case makes this crystal clear. First, *Smith* was a case on appeal from denial of qualified immunity. This procedural posture – an interlocutory appeal on an incomplete record, with the Court taking all facts in favor of the injured suspect, should make this decision unworkable for qualified immunity purposes in *any* jurisdiction. Second, in *Smith* the arrestee had run from police, but had been caught and taken to the ground when he was arrested while being handcuffed and subsequently injured. There is an entire body of caselaw on handcuffing, and few cases on the use of compliance techniques. *Smith v. Mattox* fits into the former category, not the latter. Further, the cases discussing compliance techniques support Jones, not Jennings.

CONCLUSION

The doctrine of qualified immunity is necessary if State government is to effectively operate. This case cries out for the application of that doctrine as a complete bar to the Section 1983 claims against Trooper Jones. Should this Court decline to give the "breathing space" government officials need to perform their job, the greater the potential for state employees to incur litigation costs and potential judgments under section 1983. Given that the State not only indemnifies their employees against such judgments, but also assumes the costs of their defense, these financial costs fall directly upon the State. Further, although Section 1983 lawsuits undoubtedly deter some unlawful behavior, they can, absent appropriate qualified immunity protection, make it more difficult to recruit and retain high-quality employees. Indeed, this Court has long recognized these and other "social costs" of suits against government officials, including "the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," as well as "dampen[ing] the ardor of all but the most resolute, or the most irresponsible" government officials "in the unflinching discharge of their duties." *Harlow,* 457 U.S. at 818.

For these reasons, and for the reasons previously set out in his Petition, Kenneth Jones respectfully requests that certiorari be granted.

Respectfully submitted,

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